IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. [illegible]

NORMAN MARKUSON, Appellant,

vs.

N. F. BOUCHER, Warden of the Penitentiary of North Dakota at Bismarck, Respondent.

Appeal from the District Court of the United States for the District of North Dakota.

BRIEF AND ARGUMENT FOR RESPONDENT.

EDWARD WINTERER,

Status Atty and Counsel for Respondent.

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STATEMENT.

On the 29th day of June, A. D. 1895, the appellant, Norman Markuson, a citizen of the United States and of the State of North Dakota, was convicted of the crime of contempt of court for violating the lawful provisions of a certain injunc-

tional order issued by the judge of the district court in and for the fifth judicial district of the State of North Dakota, under and pursuant to section 13, of chapter 110 of the laws of 1890, of the State of North Dakota, being section 7605 of the Revised Codes of the said state.

That thereafter, and after said Norman Markuson had been punished for the first offense, the judge of the said district court of the State of North Dakota, on the 22nd day of June, 1896, issued a temporary injunctional order in the case of the State of North Dakota ex. rel. P. J. McClory, Assistant Attorney General, vs. Norman Markuson and Michael E. Murphy, pursuant and under said section 7605 of the Revised Codes of North Dakota, which said injunctional order was personally served upon said Norman Markuson on the 26th day of June, 1896. That after the said Norman Markuson had been served with said injunction, he with others, on said 26th day of June, violated the same.

On the 17th day of June, 1897, the states attorney for Barnes County, North Dakota, filed an information in the said district court, of the fifth judicial district, of the State of North Dakota, charging the said Norman Markuson with the commission of a public offense, to-wit:—

The crime of contempt of court, committed on the said 26th day of June, A. D. 1896, by violating the lawful provisions of the said injunctional order; and further charging that the said Norman Markuson had been convicted of criminal contempt under said section 13, chapter 110, laws of 1890, being section 7605, of the Revised Codes, on the 29th day of June, 1895. Thereupon and on the 17th day of June, 1897, an attachment was issued by the said state court against said Markuson and brought before it to answer to said charge. On the 3d day of August, 1897, the said Markuson was arraigned on said information before said state court, and by his attorneys moved that the information and attatchment be dismissed and quashed for the following reasons:—

First—That the search warrant issued in said action is contrary to section 18, of the constitution of North Dakota, in this, that it is unreasonable, vague and indefinite and does not particularly describe the place to be searched or the things to be seized; that it does not appear that said search warrant was executed and returned within ten days as by section 8471, Revised Codes, required, and that said section 7605 is in conflict with section 13 of the constitution of the state in

that it deprives a person of property without due process of law.

Second—That there is another remedy provided by statute for the offense charged in the information.

Third—That the information does not charge contempt as described in said section 7605.

Fourth—That the injunctional order exceeded the prayer of the complaint.

Fifth—That the defendant demands the right to plead and be tried by the laws regulating criminal contempt as defined by chapter 34, article 1, of the code of civil procedure of the State of North Dakota.

After the overruling of the said motions the said Markuson entered a plea of not guilty.

The said Markuson thereupon demanded a trial by jury, which request was denied by the court.

He was then placed upon trial without a jury. Evidence was introduced on the part of the state, and thereupon, the defendant voluntarily, and without being required to do so by the court, offered and introduced evidence on his own behalf. After hearing and considering the evidence, and on the 6th day of August, 1897, the said state

court found the said Norman Markuson guilty of criminal contempt of court as provided by section 7605 of the Revised Codes of the State of North Dakota, and that said contempt constituted a second offense under and against the provisions of the said section. Thereupon and on the 6th day of August, 1897, the said state court duly and in open court sentenced said Markuson to imprisonment in the state penitentiary at Bismarck, North Dakota, for a period of one year.

On the said 6th day of August the said Norman Markuson perfected an appeal to the supreme court of the State of North Dakota. The said state supreme court in all things affirmed the judgment of the said district court, and thereafter, on the 7th day of December, A. D. 1897, by virtue of said judgment, the said Norman Markuson was duly committed to the state penitentiary of the State of North Dakota, at Bismarck, and confined therein.

On the 3d day of January, 1898, said Markuson filed with the United States district court for the district of North Dakota, his petition for a writ of habeas corpus, in which said petition he alleges that he was committed to said state penitentiary under and pursuant to proceedings had against him under section 7605 of the Revised

Codes of the State of North Dakota, and that said statutes are in violation of the constitution of the United States and particularly of articles five and six of said constitution. This was the first time that he specifically claimed the proceedings had against him to be in violation of the constitution of the United States. No such claim was expressly made in the state courts.

Thereupon the Hon. Chas. F. Amidon, the judge of the said United States district court, issued the writ of habeas corpus and the same was duly returned by N. F. Boucher, warden of the said state penitentiary, on the 25th day of January, 1898.

On the said 25th day of January, 1898, the said N. F. Boucher moved the court to quash the petition of said Norman Markuson and dismiss the writ of habeas corpus herein issued. Which said motion was by the said court overruled.

Thereupon, said Markuson by his attorney filed an amended petition, by permission of court, in which amended petition, the said Markuson further claims that the proceedings had against him in the state court were in violation of the 14th amendment of the constitution of the United States. After hearing certain evidence and the argument of counsel the Hon. Chas. F. Amidon,

judge of the said district court of the United States, on the 31st day of March, 1898, entered judgment, discharging the said writ of habeas corpus and remanding the petitioner Markuson to the custody of N. F. Boucher, the warden of said state penitentiary. 25

Thereupon and on the said 31st day of March, 1898, the said Markuson perfected an appeal to this court from said judgment discharging said writ. 26

BRIEF AND ARGUMENT.

The appellant, Norman Markuson, contends that the district court of the United States for the district of North Dakota erred in discharging the writ of habeas corpus and holding and adjudging that his imprisonment in the penitentiary of the State of North Dakota, for the period of one year is not contrary to law and the constitution of the United States. He claims his imprisonment to be in violation of the federal constitution in the following particulars:— 27 28

First—In violation of article five of the amendments to said constitution of the United States in that he was tried and convicted without presentment or indictment of grand jury.

29 Second—In violation of article six of said amendments in that he was tried without an impartial jury of the state and district in which the crime was committed.

Third—In violation of article six of said amendments in that section 7605 of the Revised
30 Codes of the State of North Dakota under which petitioner Markuson was convicted, permits the trial and conviction of one accused of crime without being confronted with the witnesses against him.

Fourth—In violation of section 1, of the 14th amendment to said constitution, in that said
31 state statutes and the proceedings provided for thereunder, abridge the privileges and immunities of citizens of the United States.

Fifth--In violation of said section of the 14th amendment because said statutes and proceedings deprive such citizens of liberty without
32 due process of law in that they deny to such citizens upon a criminal trial the right of trial by jury.

Sixth—In violation of said section of the 14th amendment in that said statutes and proceedings deny such citizens within the State of North Dakota the equal protection of the laws,

for the reason, that in proceedings under said 33
state statutes a contempt of court is punishable as an infamous crime, whereas in all other proceedings a contempt of court is punishable only as and for a misdemeanor.

Before considering these six propositions in their order it will be necessary to dispose of the 34
following questions which present themselves for consideration at the beginning:—

Under the facts as alleged in the petition is this proceeding by writ of habeas corpus the proper remedy?

It is clear from an examination of the record in 35
the proceedings had against the appellant Markuson in the district court of the fifth judicial district of North Dakota, that the said state court had jurisdiction to issue the injunctional order in the case of The State of North Dakota ex. rel. P. J. McClory vs. Norman Markuson et. 36
al., and it is also clear that the said state court had jurisdiction of the offense for its violation. The said state court had jurisdiction of the subject matter and also of the person of the defendant Markuson in both the civil action and criminal proceeding. The jurisdiction of the state court is questioned by the appellant virtually in

but one respect:—as to the nature and extent of the punishment, to-wit:—imprisonment in the state penitentiary for one year. It would seem that if the said state court had jurisdiction to try appellant on the charge of contempt of court without the intervention of a jury, and to punish him as for a misdemeanor, in the county jail for a period of six months or one year, that a punishment by imprisonment in the state penitentiary for the same period would constitute simply a difference as to the amount of punishment. If the punishment be harsh or excessive, it would simply be a matter of error and the judgment would not be void for want of jurisdiction. And unless the judgment of conviction be void for want of jurisdiction it cannot be attacked, collaterally, in habeas corpus proceedings.

In re Greenwald, 77 Fed. 590;
In re King, 51 Fed. 434;
In re Boyd, 49 Fed. 48;
Ex. Parte Reed, 100 U. S. 23;
Stevens vs. Fuller, 136 U. S. 498; 10 Sup. Ct. Rep. 911;

In Ex. Parte Frederich, 149 U. S. 70; 13 Sup. Ct. Rep. 793, Mr. Justice Jackson speaking of the distinction of an erroneous judgment and one wholly void, says:—"The reason of this rule lies in the fact

that a habeas corpus proceeding is a collateral attack, of a civil nature, to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should therefore be limited to cases in which the judgment or sentence attacked is clearly void, by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises."

The writ of habeas corpus is not a proceeding for the correction of errors, and cannot be used as a substitute for a writ of error.

Ex. Parte Lange, 18 Wall. 163;
Ex. Parte Siebold, 100 U. S. 371;
Ex. Parte Curtis, 106 U. S. 371; 1 Sup. Ct. Rep. 381;
Ex. Parte Royall, 117 U. S. 241; 6 Sup. Ct. Rep. 734;
Ex. Parte Frederich, supra;
In re. Snow, 120 U. S. 274; 7 Sup. Ct. Rep. 556;
Stevens vs. Fuller, 136 U. S. 468, 10 Sup. Ct. Rep. 911.

The appellant made no claim in the district oourt for the fifth judicial district of the State of North Dakota that the proceedings therein had

against him were in violation of the constitution of the United States, and such claim was not made by him in the supreme court of the state. The record is wholly silent as to any specific claim of a federal question. Appellant's demand for a trial by jury was made under section 7 of the constitution of the state. (Transcript of Record, page 38, fol. 65.) The first time that he asserted that such proceedings were in violation of the constitution of the United States is in his application for a writ of habeas corpus. It would seem, therefore, that as this matter was not presented directly to the state court for its determination, that a proceeding by writ of habeas corpus would tend to hinder and obstruct the state in the execution of the judgments of its courts. That if the question had been submitted to the supreme court of the state and determined adversely to the appellant, in the absence of exceptional and urgent circumstances, this question should be reviewed in the supreme court of the United States on a writ of error. Such is clearly the rule as expressed in

State of New York vs. Eno., 155 U. S. 89; 15 Sup. Ct. Rep. 30;

Bergmann vs. Backer, 157 U. S. 655; 15 Sup. Ct. Rep. 727;

Ex. Parte Royall, 117 U. S. 241; 6 Sup. Ct. Rep. 734; 49

Andrews vs. Schwarts, 156 U. S. 272; 15 Sup. Ct. Rep. 389;

Ex. Parte Fonda, 117 U. S. 516; 6 Sup. Ct. Rep. 848;

Re. Duncan, 139 U. S. 449, 11 Sup. Ct. Rep. 573; 50

Re. Wood, 140 U. S. 278; 11 Sup. Ct. Rep. 738;

Cook vs. Hart, 146 U. S. 183; 13 Sup. Ct. Rep. 40.

Re. Fredrich, 149 U. S. 70; 13 Sup. Ct. Rep. 793;

Pepke vs. Cronan, 155 U. S. 100; 15 Sup. Ct. Rep. 34; 51

Tinsley vs. Andersen, 171 U. S. 101; 18 Sup. Ct. Rep. 805.

Appellant alleges in his petition as a reason for the necessity and urgency for the issue of the writ that he is in straitened circumstances. It is apparent, however, that if he is able to prosecute this appeal he would also be able to prosecute and sue out a writ of error. Want of means to proceed by writ of error cannot be considered an exceptional or urgent case which would war- 52

53 rant a summary proceeding by writ of habeas corpus as such a decision would constitute a discrimination simply on the basis of wealth and violate the constitutional provision that all citizens are entitled to the equal protection of the laws. We cannot find that this court has deemed poverty such an exceptional circumstance which
54 in itself would authorize a review by writ of habeas corpus.

His claim that a writ of error could not be brought on for hearing until his term of imprisonment would expire is without force for the reason that the offense is bailable under the laws of the
55 State of North Dakota. Section 6, constitution of North Dakota. Section 8447, Revised Codes, North Dakota. And under section 1017 of the Revised Statutes of the United States he could be released on bail pending the appeal. The case presents no special circumstances requiring immediate or urgent action. Under the decision of
56 this court in the case of Whitten vs. Tomlinson, 160 U. S. 231, 16 Sup. Ct. Rep. 298, the proceeding by writ of habeas corpus is not the proper remedy.

In the case of Ex. Parte Royall the court says: "Where a person is in custody under process from a state court of original jurisdiction, for an alleged

offense against the laws of such state, and it is 57
claimed that he is restrained of his liberty in violation of the constitution of the United States, the circuit court has a discretion whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted, that discretion, however, to be subordinated to any 58
special circumstances requiring immediate action. When the state court shall have finally acted on the case, the circuit court has still a discretion, whether, under all of the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of 59
habeas corpus, summarily to determine, whether, the petitioner is restrained of his liberty in violation of the constitution of the United States."

In re. Neagle, 135 U. S. 1, the special and exceptional circumstances grew out of and involved the authority and operations of the national gov- 60
ernment, as the crime with which the petitioner was charged by the State of California was committed by him while in the performance of a duty imposed upon him by the laws and constitution of the United States. This is also true In re Loney, 134 U. S. 372, 10 Sup. Ct. Rep. 584. The matter of urgency in Widdenhus Case, 120 U.S. 1:

61 385, involved the relations and 7 Sup. Ct. Rep.
obligations of the United States with a foreign country.

Does the petition, as amended, allege sufficient facts to warrant the issue of the writ?

Section 754 of the Revised Statutes of the
62 United States requires that the petition for writ of habeas corpus shall set forth "The facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known."

Section 755 of said Statutes provides that the
63 court shall issue the writ, "unless it appears from the petition itself that the party is not entitled thereto."

It would appear, from the provisions of these statutes, that the petition should allege sufficient facts to make a prima facie case and to show that
64 the judgment or sentence under which the petitioner is held and restrained is void for want of jurisdiction and that such judgment is in violation of the constitution of the United States. The petition in this proceeding is defective in that it does not distinctly allege the offense with which the petitioner was charged and for which he was convicted and committed, or that he was convict-

ed of any particular crime. Presumably and 65
inferentially contempt of court. It does not show
that he demanded a trial by jury and was denied
such request.

The petition alleges that the proceedings had
against him—and it does not show just what
those proceedings were—were conducted under 66
and pursuant to section 7605 of the Revised Codes
of the State of North Dakota and of the other
statutes of the said state concerning and regulat-
ing said procedure, and that said statutes and
proceedings are in violation of the constitution
of the United States. The original petition
under which the writ issued does not even 67
allege that such statutes and proceedings are
in violation of the 14th amendment of the federal
constitution. It does not show specifically and
in what respect the petitioner was denied or
deprived of any right under the laws or con-
stitution of the United States. It is sought
to show that the statutes are unconstitutional, 68
but in what respect the petitioner himself was
denied any constitutional right under the state
statutes is not clearly set forth. It is impossible
to determine from the petition itself a want of
jurisdiction in the state court and that the pro-

69 ceedings had against him were actually in violation of the constitution of the United States.

The general allegations that such statutes and proceedings are in violation of the constitution of the United States are merely averments of conclusions of law and not of facts.

70 In Cuddy's Case, 131 U. S. 280, 9 Sup. Ct. Rep. 703, this court holds that—"the general allegations in the petition that the petitioner is detained in violation of the constitution and laws of the United States and of the constitution and laws of the particular state, and is held without due process of law, are averments of mere conclusions of
71 law and not of matters of fact."

We quote the language of Mr. Chief Justice Fuller in the recent case of Craemer vs. State of Washington, 168 U. S. 124; 18 Sup. Ct. Rep. 1. "The general rule is undoubted that if the detention is claimed to be unlawful by reason of the
72 invalidity of the process or proceedings under which the party is held in custody, copies of such process or proceedings must be annexed to or the essential parts thereof set out in the petition and mere averments of conclusions of law are necessarily inadequate."

And again in the case of Whitten vs. Tomlin-

son, supra, this court speaking of the petition for writ of habeas corpus says:—"But no allegation of fact in the petition can be assumed to be admitted unless distinct and unambiguous." 73

Kohl vs. Lehlbeck, 160 U. S. 293; 16 Sup. Ct. Rep. 304;
Church Hab. Corp. (2nd Ed.) section 91. 74

The motion to quash the petition and discharge the writ was made by the appellee Boucher before the introduction of any evidence. See transcript record, page 14, fol. 20; same, page 18, fol. 28, and hence the record subsequently introduced cannot be held to cure the defects in the petition. 75

Under these circumstances and the decisions of this court the petition would seem to be fatally defective.

It will be best to consider in regular order the various points and particulars in which the appellant Markuson claims that he is restrained of his liberty in violation of the constitution of the United States. 76

First—Is his imprisonment in violation of article five of the federal constitution in that he was tried and convicted without presentment or indictment of a grand jury?

77 Second—Is it in violation of article six of said amendments in that he was tried without an impartial jury of the state and district in which the crime was committed?

Third—Is it in violation of article six of said amendments in that section 7605 of the Revised
78 Codes of the State of North Dakota permits the trial and conviction of one accused of crime without being confronted with the witnesses against him?

These three questions can be answered and disposed of at once through the fact that the first twelve amendments of the constitution of the
79 United States refer exclusively to the government of the United States and place no limitations whatever upon the states. This has been so well settled by a long line of decisions of this court that it is not now an open question.

Twitchell vs. Commonwealth, 7 Wall. 321;
80 Smith vs. Maryland, 18 How. 76;
Withers vs. Buckley, 20 How. 90;
Pearson vs. Yeadall, 95 U. S., 294;
Gibbons vs. Ogden, 9 Wheat 1, 203;
John Barton et. al. vs. Baltimore, 7 Peters 243;
New York vs. Miln, 11 Peters, 102, 139;
U. S. vs. Dewitt, 9 Wall 41;

Purvear vs. Commonwealth, 5 Wall 475; 81
Cooley on Const. Limitations, Fifth Ed. 26.

It is argued by counsel for appellant Markuson that all of the amendments of the constitution of the United States refer to and are binding upon the State of North Dakota, for the reason that by article 1, section 3, constitution of North Dakota, 82 which provides that "The State of North Dakota is an inseparable part of the American Union and the constitution of the United States is the supreme law of the land," the whole constitution of the United States, and all of its amendments, by virtue of said article 1, section 3, became the supreme law of the land in North Dakota. That 83 the said amendments were thereby made a part of the constitution of the state and became part and parcel of it. Assuming this reasoning to be correct, as far as the state constitution is concerned, it would have no bearing on this case. The question presented for determination in this court, is 84 not what constitutes the constitution of the state of North Dakota, and what state statutes may or may not be valid under the said state constitution, but how far the constitution of the United States places a limit upon the constitution and laws of the state. The state statutes under consideration were held to be in harmony with the state con-

85 stitution by the supreme court of the state in the cases of State vs. Markuson, 73 N. W. Rep. 82, and State vs. Markuson, 64 N. W. Rep. 147.

It is impossible for a state by its constitution to extend the application of the constitution of the United States so as to place such state upon a
86 different and unequal footing with other states in the union. The argument of counsel seems to be that the first eight amendments to the constitution of the United States apply to the state of North Dakota, but not to any other state. That the state by its constitution has voluntarily placed itself on such unequal footing. Such is not the
87 language of the enabling act which provided that the state "shall be deemed admitted by congress into the union, under and by virtue of this act, on an equal footing with the original states from and after the date of said proclamation."

The reasoning of counsel is opposed to the
88 theory and nature of the union of the states and contrary to the express provisions and spirit of the constitution itself. A citizen of the United States in the State of North Dakota can have no greater rights under the federal constitution than such citizen in any other state. There is but one constitution of the United States and it bears and

operates alike upon all the states and all the citizens of such states. 89

Fourth—Is the appellant restrained of his liberty in violation of section 1, of the 14th amendment of the United States constitution, in that said state statutes and the proceedings had thereunder abridge the privileges and immunities of citizens of the United States? 90

The right of trial by jury is not a privilege of a citizen of the United States, except in United States courts. The privileges and immunities of citizens of the United States are such privileges and immunities as such citizens derive from the constitution of the United States, and this constitution does not give him the right or privilege of having a jury trial in criminal prosecutions in state courts. 91

We quote from the language of Chief Justice Waite in Walker vs. Sauvinet, 92 U. S. 90, "A trial by jury in suits at common law in the state courts is not a privilege or immunity of national citizenship which the states are forbidden by the 14th amendment to abridge." 92

State vs. Bates, 47 Pac. Rep. 78.

Before the adoption of the 14th amendment a citizen of the United States did not possess the

93 privilege of having a jury trial in state courts unless given by the state constitution, and the said 14th amendment does not give United States citizens any new privileges and immunities.

United States vs. Cruikshank, 92 U. S. 542;

94 Neither can it be contended on the part of the petitioner that the right to sell intoxicating liquors or to keep a place where such liquors are sold in violation of the state laws is a privilege guaranteed him under the said 14th amendment.

Barbemeyer vs. State of Iowa, 18 Wall 129;

95 The objection of appellant relates to the want of jury trial and the severe punishment meted out to him for a violation of the injunctional order. But such severe punishment, held not to be cruel or unusual by the supreme court of the state, does not abridge his privileges or immunities under the federal constitution.

96 McElvaine vs. Brush, 142 U. S. 155;
In re Kemmler, 136 U. S. 436; 10 Sup. Ct. Rep. 930.
State vs. Markuson, 73 N. W. 82.
State vs. Markuson, 64 N. W. 935.

Fifth—Do said state statutes and the proceed-

ings provided for thereunder, deprive citizens of 97
the United States of liberty without due process of law, in that they deny to such citizens upon a criminal trial the right of trial by jury?

The constitution of the United States does not limit the right of the states to regulate their own criminal procedure and a conviction in a state 98
court, according to the state law is with due process of law. This proposition is clearly substantiated in the case of Eilenbacker et. al. vs. District Court of Plymouth County, 134 U. S. 31; 10 Sup. Ct. Rep. 424. The court said: "Under Acts 20th General Assembly Iowa, c. 143, section 12, authorizing an injunction to restrain the illegal 99
sale of intoxicating liquors and providing that a person violating such injunction shall be punished for the contempt by fine or imprisonment, or both, in the discretion of the court, summary proceedings by a state court, imposing a fine or imprisonment for contempt in violating such an injunction issued by it, without presentment or indictment, 100
or trial by jury, are due process of law within the meaning of the constitution U. S. Article 14."

In Hurtado vs. People of California, 110 U. S. 516, 4 Sup. Ct. Rep. 111, it was held that the words "due process of law" in the 14th amendment of the constitution of the United States do not necessarily require an indictment by a grand

jury in a prosecution by a state for murder. Mr. Justice Mathews in the very able opinion of the court says: "We are to construe this phrase in the fourteenth amendment by the usus loquendi of the constitution itself. The same words are contained in the 5th amendment.* * * The conclusion is equally irresitable that when the same phrase was employed in the 14th amendment to restrain the action of the states it was used in the same sense and with no greater extent. And that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states it would have embodied, as did the 5th amendment, express declarations to that effect. Due process of law in the latter refers to the law of the land which derives its authority from the legislative powers conferred upon congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the 14th amendment, by parity of reasons it refers to the law of the land in each state which derives its authority from the inherent and reserved powers of the state exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides

in the right of the people to make their own laws 105
and alter them at pleasure." "The 14th amend-
ment" as was said by Mr. Justice Bradley in
Missouri vs. Lewis 101 U. S. 22, "does not pro-
fess to secure to all persons in the United States
the benefit of the same laws and the same reme-
dies. Great diversities in these respects may
exist in two states separated only by an imagin- 106
ary line. On one side of this line there may be a
right of trial by jury and on the other side no
such right. Each state prescribes its own mode
of judicial proceeding."

We quote the language of Mr. Chief Justice
Fuller, in Leeper vs. State of Texas, 139 U. S. 107
462, 11 Sup. Ct. Rep. 577, on this same matter:
"That by the 14th amendment the powers of the
state in dealing with crime within their borders
are not limited, except that no state can deprive
particular persons, or classes of persons, of equal
and impartial justice under the law. That law 108
in its regular course of administration through
courts of justice is due process, and when secured
by the law of the state the constitutional require-
ment is satisfied; and due process is so secured by
laws operating on all alike, and not subjecting
the individual to the arbitrary exercise of the
powers of the government unrestrained by the

109 established principles of private right and distributive justice."

Ex parte Converse, 136 U. S. 624; 11 Sup. Ct. Rep. 191;
In re Mahon, 34 Fed. 525;
In re Krug, 79 Fed. 308.

110

Again in Iowa Cent. Co. vs. Iowa, 160 U. S. 389, 16 Sup. Ct. Rep. 344, Mr. Justice White says: "This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of
111 action, instead of another. It is also equally evident, provided the form prescribed by the state law gives notice and affords an opportunity to be heard that the question of whether it was by a motion or ordinary action in no way rendered the proceeding not 'due process of law' within the constitutional meaning of these words."

112

Again, quoting from the language of Mr. Chief Justice Waite in Walker vs. Sauvinet, "A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is

had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state."

In harmony with these decisions we cite the following cases:

Tinsley vs. Andersen, 171 U. S. 101; 18 Sup. Ct. Rep. 805;

Baldwin vs. Kansas, 129 U. S. 52; 9 Sup. Ct. Rep. 193;

In re Kemmler, 136 U. S, 436; 10 Sup. Ct. Rep. 930;

Arrowsmith vs. Harmoning, 118 U. S. 194; 6 Sup. Ct. Rep. 1023;

Moore vs. State of Missouri, 16 Sup. Ct. Rep. 179;

Caldwell vs. Texas, 137 U. S. 692; 11 Sup. Ct. Rep. 224;

Lowe vs. State of Kansas, 163 U. S. 81; 16 Sup. Ct. Rep. 1031;

Hallinger vs. Davis, 146 U. S. 314; 13 Sup. Ct. Rep. 105;

Missouri vs. LeWis, 101 U. S. 22;

Davidson vs. New Orleans, 96 U. S. 97;

Murrays Lessee vs. Improvement Co., 18 Howard, 272;

117 Ex Parte Wall, 107 U. S. 288; 2 Sup. Ct. Rep. 569.

Kannard vs Lousiana ex. rel., 92 U. S. 480;

Munn vs. Ill., 94 U. S. 113;

Rowan vs. State, 30 Wis. 129, a well considered case and cited with approval in Hurtado vs. California, supra.

118 McNulty vs. People of California, 149 U. S. 645; 13 Sup. Ct. Rep. 959.

Bergeman vs. Backer, 157 U. S. 655; 15 Sup. Ct. Rep. 727;

Ex Parte Harding, 120 U. S. 782; 7 Sup. Ct. Rep. 780.

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It is strenously contended by counsel that the proceedings had against appellant Markuson were not due process of law in that he was sentenced to the penitentiary. That the amount, extent and nature of the punishment itself, as distin-
120 guished from the proceedings or trial proper, related back, as it seems, to such trial and proceedings and made the same void as against due process of law. Although the meaning of the phrase "due process of law" has not been precisely defined and limited, still it is quite clear that it refers to the inquiry, proceeding, or trial, as distinguished from its results. It is defined

by this court in the case of Pennoyer vs. Neff, 121
95 U. S. 715, as a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights.

The extent of punishment is not limited by the constitutional provision of due process of law, but 122
by the provision against cruel and unusual punishments. This provision in the federal constitution does not refer to the states. The supreme court of North Dakota held that this provision, section 6, article 1, of the state constitution, was not violated by the proceedings had against the appellant Markuson. In State vs. Markuson, 64 N. W. 123
Rep. 935, the state supreme court said: "And when so punished the amount of punishment rests in the discretion of the court, uncontrolled by the statute which prescribes the punishment for misdemeanors and limited only by the constitutional provision against cruel and unusual punishments." This decision was adhered to by that court in 124
State vs. Markuson, 73 N. W. Rep. 82.

This decision of the supreme court of North Dakota is conclusive upon this court as held by it in the case of McIlvaine vs. Brush, supra, and In re Kemmler, supra. It was also held by this court in said two cases that the imposition of

cruel and unusual punishments by a state is not included in and prohibited by the term "due process of law" in the 14th amendment of the constitution of the United States.

The appellant was in fact accorded all the rights and privileges of any defendant in a criminal proceeding except trial by jury. He was not required to be a witness against himself. The statute in question does not require it. "The accused may plead in the same manner as to an information or indictment, in so far as the same is applicable. Evidence may be oral or in the form of affidavits, or both; the defendant may be required to make answer to interrogatories, either written or oral, as in the discretion of the court or judge may seem proper; the defendant shall not necessarily be discharged upon his denial of the facts stated in the moving papers; the clerk of the court shall, upon application of either party, issue subpoenas for witnesses, and except as above set forth, the practice in such contempt proceedings shall conform as nearly as may be to that adopted by the ninetieth rule of the supreme court of the United States for proceedings in equity in the circuit courts."

The answer to interrogatories means the same as to plead to the information or indictment. As

a matter of fact, (Transcript Record page 28, fol. 48) he pleaded not guilty to the information and testified voluntarily in his own behalf. (Transcript Record page 33, fol. 55½). 129

It is a well established and wholesome rule of law that no one can take advantage of the constitutionality of an independent provision of law who has no interest in and is not affected by such provision. 130

Del Castillo vs. McConnico, 168 U. S. 674; 18 Sup. Ct. Rep. 233;
State vs. Becker, 51 N. W. Rep. 1018;
Williams vs. State of Miss., 170 U. S. 213, 18 Sup. Ct. Rep. 583; 131
State vs. Snow, 3 R. I. 64;
Stickrod vs. Co. (Ky). 5 S. W. Rep. 580;
Sinclair vs. Jackson, 8 Cowan, 543.

As appellant was not obliged to testify against himself, the clause in the said statute has no bearing on this case. 132

Counsel further intimates that appellant has been convicted of an infamous crime by a civil court. We cannot assent to this proposition. It is true that the injunction was issued in a civil action. But the trial of appellant for contempt

133 for violating such injunction is a separate and distinctly criminal proceeding prosecuted by the State of North Dakota as in other criminal actions. Under section 103 of the state constitution the trial court has original jurisdiction in all cases at law and in equity with power to issue an injunction. It has inherent power to punish for contempt, and
134 such punishment must be adequate to compel obedience to its lawful orders, and limited only by the constitutional provision of the state against cruel and unusual punishments, and it matters not whether such punishment amounts to that provided for a felony. State vs. Markuson supra, (both cases).

135 Proceedings for contempt of court are not subject to the right of trial by jury and the infliction of punishment under section 7605 of the Revised Codes of North Dakota for such contempt does not violate the guaranty of jury trial under the constitution of the State of North Dakota or the
136 constitution of the United States.

We contend, that even if the constitution of the United States in specific and express terms extended to appellant Markuson the right of trial by jury in the state courts, in the same manner and form as it does in United States courts, still he would not be entitled, under the constitution, to a trial by jury in contempt proceedings.

Says Mr. Justice Miller in Eilenbacker vs. 137
Plymouth County, supra, "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury we have been unable to find any instance of it. It has always been one of the attributes, one of the powers necessarily incident to a court of justice, that it 138
should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power." And further, "We simply hold that whatever its nature may be it is an offense against the court and against the administration of justice for 139
which courts always have had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the 14th amendment of the constitution."

This has been the ruling of this court in a long 140
line of cases, without qualification or limitation as to the amount of punishment imposed, whether such punishment be greater or less than that provided for a statutory felony.

In re Debs, 158 U. S. 564, 15 Sup. Ct. Rep. 900;

141 Ex Parte Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77;

Anderson vs. Dunn, 6 Wheat. 204, 227;

Ex Parte Savin, 131 U. S. 267, 9 Sup. Ct. Rep. 699;

Ex Parte Cuddy, 131 U. S. 280, 9 Sup. Ct. Rep. 703;

142 Ex Parte Robinson, 19 Wall. 505;

U. S. vs. Hudson, 7 Cranch, 34;

Mugler vs. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273;

Commission vs. Brimson 154, U. S. 447, 4 Sup. Ct. Rep. 1125;

Tinsley vs. Andersen, supra.

143 The decisions are uniform in this respect. It is impossible to find an exception.

State vs. Markuson, 73 N. W. Rep. 82 (N. D.) judgment involved in this case.

Cartwright's Case, 114 Mass. 230;

State vs. Markuson, 64 N. W. 935, (N. D.)

144 Ex Parte Grace, 12 Iowa, 208;

Neal vs. State, 9 Ark. 259;

State vs. Mathews, 37 N. H. 450;

State vs. Frew, 24, W. Va. 416;

State vs. Calugerty, (W. Va.) 10 S. E. Rep. 407;

Hughes vs. People, 5 Col. 436;

People vs. Wilson, 64 Ill. 195;

Batchelder vs. Moore, 42 Cal. 415; 145
Wyatt vs. People. 28 Pac. Rep. 961;
Arnold vs. Com. 44 Am. Rep. 480;
4 Blacks Com. Ch. 20;
3 Am. & Eng. Ency. Law, 721;
5 Crim. Law, Mag. 515;
Garrigus vs. State, 93 Ind. 239;
State vs. Doty, 90 Am. Dec. 671; 146
State vs. Becht, 23 Minn. 411;
State vs. Merrill, 16 Ark. 403;
Watson vs. Williams, 36 Miss. 331;
Cooley Cons. Lim., 5th Ed. 390-note;
King vs. Almon, 8 St. Trials 53;
Respublica vs. Oswald, 1 Dall, 319, 1 Am. Dec. 246; 147
Mariner vs. Dyer, 2 Me. 165;
Morrison vs. McDonald, 21 Me. 550;
Yates vs. Lansing, 6 Am. Dec. 290;
Sanders vs. Metcalf, 1 Tenn. Ch. 419;
Clark vs. People, 1 Ill. 340, 12 Am. Dec. 177;
Ex Parte Adams, 25 Miss. 883; 148
State vs. Copp, 15 N. H. 212;
Middlebrook vs. State, 43 Conn. 259.

Sixth—Do said state statutes and the proceedings provided for thereunder deny citizens of the United States the equal protection of the laws, in that under said statutes and proceedings con-

tempt of court is punishable as an infamous crime without trial by jury, whereas in all other proceedings under the state laws a contempt of court is punishable only as and for a misdemeanor?

The 14th amendment of the constitution of the United States merely requires that all persons subjected to legislation shall be treated alike under like circumstances and conditions, both in the liabilities imposed and the privileges conferred. Appellant claims that he was denied the equal protection of the laws as against other citizens because section 7605, supra, fixes the punishment for the second offense for violating an injunction issued under its provisions at imprisonment in the state penitentiary for one year, while punishment for any other offense of contempt of court under the state laws is no greater than that for a misdemeanor. Hence a discrimination against him and second offenders. Also that in the ordinary criminal proceedings wherein the punishment is imprisonment in the state penitentiary the defendant has the right of trial by jury, while under said section 7605, he is so imprisoned without a jury trial.

It will be noticed that the discrimination, if any there be, relates not to any individual, person, or class of persons, but to the crime itself. Mar-

kuson has the same right under said statutes as 153
any other citizen in the state of North Dakota. Any one guilty of the second offense of contempt of court under said section will receive exactly the same punishment. All citizens of the state and citizens of the United States within the state, are exactly on the same footing and treated alike under said section. It operates alike and equally 154
upon all persons under like and similar conditions and circumstances. Hence there is no discrimination and can be no discrimination as to persons or classes. It may be contended that a certain number of persons in North Dakota, interested in the sale of intoxicating liquors in violation of the state laws, are the ones 155
who will violate such injunctional orders. That such persons constitute a "class" and have rights as a "class" and therefore entitled to equal privileges with others. There is and can be no such class as liquor dealers and sellers in the State of North Dakota, for such business is prohibited by 156
the constitution and statutes. The sale of intoxicating liquor is a crime. Criminals have no rights, privileges or immunities, as a "class." From the standpoint of law there is and can be no "class of criminals." The term "class" in the matter of "class legislation" refers to some distinction or basis of classification existing in har-

157 mony with law, sanctioned and permitted by it and not in violation of law. Otherwise the violaters of law would claim privileges and immunities under the law because they do violate it. This is not the meaning of the language used in the 14th amendment of the constitution of the United States.

158 It is not designed to protect classes of criminals or criminals as a class, but persons and classes of persons, classified on a basis of law and right, and not on crime. Criminals cannot secure rights out of crime itself. Rights are based on right doing and not on wrong doing.

159 In the case of Hayes vs. Missouri, 120 U. S. 68; 7 Sup. Ct. Rep. 350, the court says: "The 14th amendment of the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate.
160 It merely requires that all persons subjected to such legislation shall be treated alike under all circumstances and conditions, both in privileges conferred and in the liabilities imposed. As we said in Barbier vs. Connolly, speaking of the 14th amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation, which in carrying out a public

purpose, is limited in its application, if within the 161
sphere of its operation it affects alike all persons similarly situated is not within the amendment.' "

Barbier vs. Connolly, 113 U. S. 27; 5 Sup. Ct. Rep. 357;

In Pace vs. Alabama, 106 U. S. 583; 1 Sup. Ct. Rep. 637, it was held by this court that section 162
4189 of the code of Alabama punishing adultery or fornication committed by a white person and negro with each other more severely than the same offense committed between persons of the same race and color is punished by the same code does not make a discrimination against colored persons in the punishment designated which con- 163
flicts with the clause of the 14th amendment prohibiting a state from denying any person within its jurisdiction the equal protection of the laws, for section 4189 applies the same punishment to both offenders, the white and black. The discrimination in the punishment prescribed is 164
directed against the offense designated and not against the person of any particular color or race.

This case is directly in point with the case at bar. It seems clearly decisive of the objection raised by the appellant. A discrimination which is directed to the offense does not come within the amendment.

165 And again, quoting the language of Mr. Justice Harlan in Fielden vs. Illinois, 143 U. S. 452; 12 Sup. Ct. Rep. 528, "We take, as is our duty, the law of Illinois to be, as declared by its highest court, that amendments of a record of a court, in derogation of its final judgment, are not permitted in the state, after the expiration of the
166 term at which the judgment was rendered. That law is applicable to all persons within the jurisdiction of the state; and its enforcement against the plaintiff in error, cannot, therefore, be said to be a denial to him by the state of the equal protection of the laws. Neither discussion or citation of authorities is required to support a
167 proposition so manifestly correct."

In the very recent case of Tinsley vs. Andersen, supra, this same proposition was sustained. Tinsley was committed for contempt of court by a Texas state court. He claimed to be restrained of his liberty in violation of the 14th amendment
168 of the federal constitution. Says Mr. Chief Justice Fuller: "The right to the equal protection of the laws was certainly not denied, for it is apparent that the same law or course of proceedure which was applied to Tinsley would have been applied to any other person in the state of Texas under similar circumstances and conditions;"

And in re Krug, 79 Fed. 308, it is held, "That 169
a statute which prescribes a particular form of indictment as to a particular offense, does not deprive one who commits that offense of the equal protection of the laws, the statute being equal and uniform in its operations as to all who come within its scope."

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And whenever the law operates alike on all persons and property, similarly situated, equal protection of the laws cannot be said to be denied.

Lowe vs. State of Kansas, supra.

Duncan vs. State, 152 U. S. 377, 14 Sup. Ct. Rep. 570;

People vs. Coon (67 Hun. 523), 22 N. Y. 171
S. 865;

State vs. Burgdorfer, 17 S. W. Rep. 647 (Mo.)

State vs. Kingsley, 18 S. W. Rep. 994 (Mo.);

State ex. rel. Goodsil vs. Woodmansee (N. D.); 46 N. W. Rep. 970;

172

In re. Mullholland 32 Pac. Rep. 568 (Cal.);

Missouri vs. Lewis, 101 U. S. 22;

R. R. Co. vs. Richmond, 96 U. S. 529;

Missouri Pac. R. R. Co. vs. Mackey, 127 U. S. 205; 8 Sup. Ct. Rep. 116;

Minneapolis & St. Louis R. R. Co. vs. Herrick, 127 U. S. 210, 8 Sup. Ct. Rep. 1176;

173 Soon Hing vs. Crowley, 113 U. S. 703, 5 Sup. Ct. Rep. 730;

Walston vs. Nevin, 128 U. S. 562; 9 Sup. Ct. 113.

Counsel further argues that the offense of contempt of court as designated in said section 7605
174 is the same offense as any other contempt of court in other proceedings under state statutes. That all offenses of contempt of court under the state laws are the same offenses. That appellant is imprisoned in the state penitentiary for one year while his fellow citizen who commits the same offense, to-wit: contempt of court in another pro-
175 ceeding, is punished less. We challenge the correctness of his proposition. Contempt of court under said section is no more the same offense than murder in the first degree is the same offense as manslaughter, or that grand larceny is the same offense as petit larceny. The legislature
176 has the right to fix and grade the punishments for different offenses. Reasoning from the standpoint that the court is bound to follow said section 7605 in fixing the punishment, which is not necessary under the decision of the supreme court of the state, the legislature has as much right to grade and fix the punishment for offenses of contempt of court as for any other offenses against

the state. The provision under the 14th amend- 177
ment is satisfied when all persons guilty of exactly the same offenses are punished alike. When all persons charged with the same offenses shall have the same rights of being heard. When the law operates exactly alike upon all who violate it or come under its influence.

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It is certainly a more serious offense to violate a written order of court, than to speak of it disrespectfully in the heat of passion. It is a more serious offense to violate an order of court affecting the rights and the welfare of the people, than to violate one affecting simply private interests. And unquestionably, when one twice, wilfully 179
and deliberately, violates an order of court, pertaining to the same matter, it constitutes such a defiance of law and the authority of the court, as to warrant severe punishment. For this reason, the legislature and the courts have a right to fix and grade the punishments commensurate with the nature and gravity of the offense. If such 180
legislation be considered unwise or unequal its correction must be sought through the legislature and not in this court.

Waltson vs. Nevin, supra.

It is further claimed by counsel for appellant that the proceedings under said section 7605 are

181 in fact but a substitute for prosecutions by jury. That the legislature has sought to do that indirectly which it cannot do directly. That it substitutes trial by injunction for trial by jury. This contention cannot prevail. The violation of an injunction cannot relate to any act prior to its issue or service. If the accused had violated the
182 law as to intoxicating liquors before the issue of the injunction he has a right under the state laws to be tried by jury. The injunction does not cover it. It cannot therefore be a substitute.

This court says: In re Debs. "A court enforcing obedience to its orders by proceedings for
183 contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudgod them entitled to."

And again, "That the penalty for violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in
184 the course of such violations."

Furthermore, under the decision of this court in the case of Missouri vs. Lewis, supra, the State of North Dakota has the right, directly, to prescribe its own judicial procedure and to abolish trial by jury in all cases. Such action on the part of the state will not be in conflict with the constitution of the United States as long as all

citizens are treated alike under similar circum- 185
stances and conditions.

Walker vs. Sauvinet, supra;
Edwards vs. Elliott, 21 Wall. 532;
Pearson vs. Yeadall, 95 U. S. 294;
Ex Parte Converse, supra;
Cooley Constitutional Limitations, Fifth 186
Ed. 26.

The objection that inasmuch as said section 7605 provides one kind of procedure for violations of injunctions issued under it and the other statutes a somewhat different procedure for other contempts, and that appellant did not receive the equal protection of the laws by being tried and 187
convicted pursuant to the provisions of said section, has been answered by the decisions of this court already cited. As long as the procedure under said section operates alike upon all who come within the its scope it does not violate the constitutional guaranty of equal protection under 188
the 14th amendment.

Iowa Cent. Co. vs. Iowa, 160 U. S. 389,
16 Sup. Ct. Rep. 344.

The objection presents no federal question. The legislature has the constitutional right to establish the procedure and fix the punishment in

189 all offenses against the state. It matters not whether all offenses are tried by the same form of action, or whether each offense has its own form of action. If the procedure gives notice and an opportunity for defense and operates alike on all, under like conditions, the requirement under the federal constitution is not violated.

190

In conclusion we assert with great confidence that the conviction of appellant Markuson is not in violation of the constitution or laws of the United States; that he was duly tried and sentenced under and pursuant to the laws of the State of North Dakota, and that such conviction
191 was by due process of law, the law of the land and of his domicile; that he enjoyed the same privileges and received the same protection as all others under similar circumstances and conditions; that he received the same punisnment that others would for the same offense; that he was confronted with all of the witnesses against him,
192 pleaded to the information and voluntarily testified in his own behalf.

Every right and privilege secured to him by the constitution of the United States and the established principles of justice were extended to him. His trial, conviction and sentence are in harmony with the requirements of the constitu-

tion of the state and of the United States, in line 193
with the well settled principles of right and procedure and sustained, in analogy, by many decisions of this honorable court.

In view of the premises we beg to submit to this honorable court, that the decision of the lower court be affirmed and that the State of 194
North Dakota be permitted to enforce the just judgment of her courts.

Respectfully submitted,

EDWARD WINTERER,

State's Attorney and Attorney for Respondent.

No. 77.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 77.

NORMAN MARKUSON, APPELLANT,

vs.

N. F. BOUCHER, WARDEN, &c.

Extract from Revised Codes of North Dakota, 1895.

Sec. 13, c. 110, 1890, am'd.

SEC. 7605. PLACE OF SALES A NUISANCE—TO BE ABATED—LIQUORS DESTROYED—PRESUMPTIONS—PROCESS—PROCEDURE—PENALTIES.—All places where intoxicating liquors are sold, bartered, or given away, in violation of any of the provisions of this chapter, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this chapter, are hereby declared to be common nuisances; and if the existence of such nuisance is established, either in a criminal or equitable action, upon the judgment of a court or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his deputy, or under sheriff or any constable of the proper county or marshal of any city where the same is located

shall be directed to shut up and abate such place, by taking possession thereof, if he has not already done so, under the provisions of this chapter, and by taking possession of all such intoxicating liquors found therein together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining such nuisance, and such personal property so taken possession shall, after judgment, be forthwith publicly destroyed by such officer, and the owner or keeper thereof shall, upon conviction be adjudged guilty of maintaining a common nuisance, and shall for the first offense be punished by a fine of not less than two hundred nor more than one thousand dollars, and by imprisonment in the county jail not less than ninety days nor more than one year, and for the second and every successive offense be punished by imprisonment in the penitentiary not exceeding two years and not less than one; and said officer abating such nuisance shall securely close said building, erection or place where such nuisance was located, as against the use or occupation of the same for saloon purposes and keep the same securely closed for the period of one year (unless sooner released as hereinafter provided), and any person breaking open said building, erection or place or using the premises so ordered to be closed, shall be punished for contempt as hereinafter provided, in case of violation of injunctions; provided, however, that when leasehold premises are adjudged to be a nuisance, the owner thereof shall have the right to terminate the lease, by giving three days' notice thereof, in writing, to the tenant, and when this is done, the premises shall be turned over to the owner upon the order of the court or judge. But the release of the property shall be upon condition that the nuisance shall not be continued, and the return of the property shall not release any lien upon said property occasioned by any prosecution of the tenant. If the owner appears and pays all costs of the proceedings and files a bond with sureties to be approved by the clerk in the full value of the property to be ascertained, by the

court or judge, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within the period of one year thereafter, the court, or in vacation the judge may, if satisfied of his good faith, order the premises taken and closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property, and if the proceeding is an action in equity and bond is given and cost therein paid before judgment and order of abatement the action shall be thereby abated; provided, however, that the release of the property under the provisions of this section shall not release it from any judgment, lien or penalty or liability to which it may be subject under any other statute or law.

The attorney general, his assistant, State's attorney, or any citizen of the county where such nuisance exists or is kept or is maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint or both, may be made by the State's attorney, attorney general or his assistant, upon information and belief; and no bond shall be required; and if an affidavit shall be presented to the court or judge, stating or showing that intoxicating liquor, particularly describing the same, is kept for sale, or is sold, bartered or given away, on the premises, particularly describing the same, where said nuisance is located, contrary to law, the court or judge must at the time of granting the injunction issue his warrant commanding the officer serving said writ of injunction, at the time of such service to search diligently the premises and carefully invoice all the articles found therein, used in or about the carrying on of the unlawful business, for which search and invoicing said officer shall receive the sum of ten dollars in addition to the fees now allowed by law for serving an injunction. If

such officer upon such search shall find upon such premises any intoxicating liquor or liquors of any kind he shall take the same into his custody and securely hold the same to abide the final judgment in the action (the expenses for such holding to be taxed as part of the costs in the action); and such officer shall also take and hold possession of all personal property found on such premises, and shall take and hold possession of such premises and keep the same closed until such final judgment.

The finding of such intoxicating liquor or liquors on such premises shall be *prima facie* evidence of the existence of the nuisance complained of. Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt for the first offense by a fine of not less than two hundred nor more than one thousand dollars, and by imprisonment in the county jail not less than ninety days nor more than one year, and for the second and every successive offense of contempt by imprisonment in the penitentiary not exceeding two years and not less than one in the discretion of the court or judge thereof. In case judgment is rendered in favor of the plaintiff in any action, brought under the provisions of this section, the court or judge rendering the same shall also render judgment for a reasonable attorney's fee in such action in favor of the plaintiff and against the defendants therein; which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney or attorneys of the plaintiff therein; provided, if such attorney is the State's attorney such attorney's fee shall be paid into the county treasury as in section 7603 provided. In contempt proceedings arising out of the violation of any injunction granted under the provisions of this chapter the court, or in vacation the judge thereof, shall have the power to try summarily and punish the party or parties guilty as required by law. Process shall run in the name of the State of North

Dakota. The affidavits upon which the attachment for contempt issues shall make a *prima facie* case for the State.

The accused may plead in the same manner as to an information or indictment, in so far as the same is applicable; evidence may be oral or in the form of affidavits, or both; the defendant may be required to make answer to interrogatories, either written or oral as in the discretion of the court or judge may seem proper; the defendant shall not necessarily be discharged upon his denial of the facts stated in the moving papers, the clerk of the court shall upon the application of either party, issue subpœnas for witnesses, and except as above set forth, the practice in such contempt proceedings, shall conform as nearly as may be to that adopted by the ninetieth rule of the Supreme Court of the United States for proceedings in equity in the circuit courts.

(N. B.—Section 7605 of the Revised Codes of the State of North Dakota is identical with section 13 of chapter 110 of the General Laws of 1890 of the State of North Dakota, to which reference is made.)